

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

In the Matter of the Application)	Utility Division
of Westech Energy Corporation)	Docket No.
for an Order Recognizing it as)	D2004.12.195
as a Regulated Common Carrier)	
)	DECLARATORY
)	RULING

DECLARATORY RULING

Introduction

1. On December 10, 2004, Westech Energy Corporation (Westech) filed before the Public Service Commission (Commission) an application for an order recognizing it as a regulated common carrier, or in the alternative for an order recognizing Westech's consent to regulation as a common carrier (Application).

2. On February 16, 2005, the Commission issued a Notice of Application and Intervention Deadline (NAID) establishing March 7, 2005 as the deadline to intervene or comment. The NAID was served on the parties to the docket and the Montana Consumer Counsel and published in the Stillwater County News. No individual or entity filed a petition to intervene or comments.

3. On April 19, 2005, Westech filed a Motion to Convert Application to a Petition for Declaratory Ruling. On May 10, 2005, the Commission granted Westech's motion.

4. Pursuant to § 2-4-501, MCA, and ARM 38.2.101 and 1.3.226 through 1.3.229, the Commission exercises jurisdiction to make declaratory rulings as to the applicability of any statutory provision or any rule or order of the Commission.

Facts Presented

5. Westech represents that it "proposes to build a natural gas transportation pipeline from the Dean Dome Field, an existing oil and gas field near Dean, Montana, to an interconnection with NorthWestern Energy Corporation's¹ major natural gas transportation pipeline just northeast of Absarokee, Montana." Application at 1.

6. Westech states that its "intent is to use the proposed pipeline to facilitate the production of stranded gas reserves throughout a large part of Stillwater County." Application at 1.

7. Westech describes its intentions as follows:

¹ The Commission is not aware of any entity named NorthWestern Energy Corporation. NorthWestern Energy is a division of NorthWestern Corporation. For purposes of this ruling the Commission assumes that Westech means NorthWestern Energy's pipeline.

We plan to utilize the proposed pipeline to provide non-discriminatory access to all producers who want to transport their natural gas. Our interconnect with NorthWestern Energy will allow us, and all other producers who share our line, to market natural gas to anyone in the state. We also anticipate the possibility of providing another source of natural gas to the local retail market through future extensions of our pipeline.

Application at 1.

Question Presented

8. Does crude petroleum or the products thereof include natural gas for purposes of § 69-13-101, MCA?

Applicable Law

9. Section 69-13-101(1), MCA, provides:

The following are hereby declared to be common carriers and subject to the provisions of this chapter: every person, firm, corporation, limited partnership, joint-stock association, or association of any kind whatsoever:

(a) owning, operating, or managing any pipeline or any part of any pipeline within the state for the transportation of crude petroleum, coal, or the products thereof to or for the public for hire or engaging in the business of transporting crude petroleum, coal, or the products thereof by pipeline;

(b) owning, operating, or managing any pipeline or any part of any pipeline for the transportation of crude petroleum, coal, or the products thereof to or for the public for hire, which pipeline is constructed or maintained upon, along, over, or under any public road or highway;

(c) owning, operating, or managing any pipeline or any part of any pipeline for the transportation of crude petroleum, coal, or the products thereof to or for the public for hire, which pipeline is or may be constructed, operated, or maintained across, upon, along, over, or under the right-of-way of any railroad, corporation, or other common carrier required by law to transport crude petroleum, coal, or the products thereof as a common carrier;

(d) owning, operating, or managing or participating in ownership, operation, or management, under lease, contract of purchase, agreement to buy or sell, or other agreement or arrangement of any kind whatsoever, any pipeline or

any part of any pipeline for the transportation from any oil field, coal mine or field, or place of production within the state to any distributing, refining, or marketing center or reshipping point thereof, within this state, of crude petroleum, coal, or the products thereof, bought of others; or

(e) made a common carrier by or under the terms of contract with or in pursuance of the law of the United States.

10. Section 69-13-102(1) provides:

It is declared that the operation of these pipelines, to which this chapter applies, for the transportation of crude petroleum, coal, or the products thereof, in connection with the purchase or purchase and sale of such crude petroleum, coal, or the products thereof, is a business in mode of the conduct of which the public is interested and as such is subject to regulation by law. The business of purchasing or of purchasing and selling crude petroleum, coal, or the products thereof, using in connection with such business a pipeline of the class subject to this chapter to transport the crude petroleum, coal, or the products thereof so bought or sold shall not be conducted unless such pipeline so used in connection with such business is a common carrier within the purview of this law and subject to the jurisdiction herein conferred upon the commission.

11. Section 69-13-103(2), MCA, provides:

Any person, firm, limited partnership, joint-stock association, or corporation may acquire the right to construct pipelines and such incidental telephone and telegraph lines along, across, or over any public road or highway in this state by filing with the commission acceptance of the provisions of this law, expressly agreeing in writing that in consideration of the right so acquired, it shall be and become a common carrier pipeline, subject to the duties and obligations conferred or imposed in this chapter. In the exercise of the privileges herein conferred, such pipelines shall compensate the county for any damage done to such public road in the laying of pipelines or telegraph or telephone lines along or across the same. Nothing herein shall be construed to grant any pipeline company the right to use any public street or alley in any incorporated city or town except by express permission from the city or governing authority thereof.

Analysis

Does crude petroleum or the products thereof include natural gas for purposes of § 69-13-101, MCA?

12. The Commission has not previously ruled on whether crude petroleum or the products thereof includes natural gas for purposes of Title 69, Chapter 13, MCA. Currently, no natural gas pipeline companies are regulated by the Commission as common carriers.

13. The Commission has not been confronted with this issue due to the manner in which the natural gas industry has developed. In many cases pipelines were interstate in nature and federal law preempted state regulation. In other situations, intrastate pipelines were owned and operated by a public utility and the pipeline was regulated under Title 69, Chapter 3, MCA. In regulating these intrastate pipelines, the Commission enabled the pipeline companies to claim "Hinshaw pipeline" status and avoid federal regulation.² See, e.g., In the Matter of the Application of the Montana Power Company for Authority to Establish New Rates Required to Implement its Gas Transportation Plan, Docket No. 90.1.1, Order 5474c (September 26, 1991).

14. On the federal level, the Federal Energy Regulatory Commission (FERC) regulates both oil and natural gas pipelines. However, the source of regulatory authority and the scope of regulation are different for each type of pipeline. Natural gas pipelines are regulated under the Natural Gas Act; oil pipelines are regulated under the Interstate Commerce Act. See SFPP, L.P., 93 F.E.R.C. ¶ 63,023, ¶ 65,090 (2000); Lakehead Pipe Line Co., 65 F.E.R.C. ¶ 63,021, ¶ 65,124 (1993). Oil pipelines are common carriers. Natural gas pipelines, after restructuring and open access, have obligations similar to those of common carriers. Regulation of oil pipelines preceded by many decades regulation of natural gas pipelines.

15. The dichotomy of these regulatory schemes is somewhat artificial. Oil pipelines can be converted to natural gas pipelines and natural gas pipelines can be converted to oil pipelines. Compare River Co. v. Texas Eastern Transmission Corp., No. Civ. 93-209, 1954 U.S. Dist. LEXIS 3724, 1954 Trade Cas. (CCH) ¶ 67,840 (D.N.Y., 1954) (conversion of pipeline from transportation of natural gas to transportation of petroleum products) with Granite State Gas Transmission, Inc., 40 F.E.R.C. ¶ 61,165 (1987) (lease and conversion of oil pipeline to transportation of natural gas).

16. The original source of Chapter 13 of Title 69 is Ch. 8, Laws of Montana 1921, Extraordinary Session (1921 Act). Initially, only pipeline transporters of crude petroleum were

² Pursuant to § 1(c) of the Natural Gas Act (15 U.S.C. § 717(c)) a Hinshaw pipeline is one within the boundaries of a state the natural gas from which is consumed in the state and the rates and service of which are regulated by a state commission.

common carriers. See §1, Ch.8, Laws of Montana 1921, Extraordinary Session. The legislature did not define crude petroleum. In a portion of the 1921 Act the legislature limited certain of the Commission's authority to oil.³ This limitation would not have been necessary if the legislature intended crude petroleum to be synonymous with oil.

17. In 1955 the legislature extended the scope of the statute to include transportation of petroleum products. See Ch. 190, Laws of Montana 1955. However, the title of the act demonstrates that the legislature intended the act to apply to oil (An Act to Amend Chapter 2, of Title 8, and Particularly Sections 8-201, 8-202, 8-204, 8-205, 8-206, and 8-207 of the Revised Code of Montana of 1947, All Relating to Pipe Line Carriers of Oil . . .). The amendments that were adopted were in Senate Bill 73. The legislative history of the Senate Bill 73 is sparse. Nothing in either the House Journal or the Senate Journal explains the purpose of the amendments. The minutes of the Senate Committee on Oils and Leases for January 28, 1955 provide, "Senate Bill 73 was also discussed, and upon motion of Sen. Robins, which was seconded by Sen. Taylor, the committee unanimously agreed that it 'do pass'." The minutes of the House Committee on Oil and Gas for February 25, 1955 provide, "Senator Rex Hibbs appeared before the committee and explained Senate Bill No. 73. Discussion was had. Fulton made the motion that it be concurred in. It was seconded by Judeman. The motion was carried." Nothing in the amendment addressed the definition of crude petroleum.

18. In 1982, the Commission approved Roughrider Pipeline Company's (Roughrider) acceptance of jurisdiction under § 69-13-101, et seq., MCA. See U-82.07.20.00-OP, Commission Files. Roughrider represented that its pipeline would be used to transport "wet natural gas" produced in association with crude oil. See U-82.05.21.00-OP, Commission Files, attachment. Roughrider cited Phillips Pipe Line Co. v. United States, 40 F. Supp. 981 (Ct. Cl. 1941), for the proposition that wet natural gas is a constituent of crude petroleum.

19. In Phillips Pipe Line Co. the court interpreted the Revenue Act of 1932 which imposed a tax on transportation by pipeline of crude petroleum and the liquid products thereof. 40 F. Supp. at 986. The court reasoned that natural gasoline and straight-run gasoline were essentially the same product, that the tax applied to straight-run gasoline and that a natural construction of the revenue act required the application of the tax to natural gasoline. 40 F. Supp. at 988. The court placed substantial emphasis on language in the act that was changed during the legislative process. The bill originally provided for a tax on the transportation of oil by

³ Section 5 of the 1921 Act provided, in pertinent part, "The [Commission] is also empowered and required to make rules for the ascertainment of the amount of water and other foreign matter in oil tendered for transportation." §5, Ch. 8, Laws of Montana 1921, Extraordinary Session (codified at § 3852, Revised Code of Montana of 1935 and §8-205, Revised Code of Montana of 1947).

pipeline. Id. The Senate committee changed the language to provide for a tax on the transportation by pipeline of crude petroleum and the liquid products thereof. Id. The Committee Report explained that the change made transportation of gasoline as well as crude oil taxable. Id. The Conference Report also explained that the change in wording made the tax applicable to crude petroleum and its liquid products instead of to oil only. Id. The court held that natural gasoline was a liquid product of crude petroleum for purposes of the Revenue Act of 1932. 40 F. Supp at 988. The court stated:

There are many chemical names for the different types of gas and liquid hydrocarbons. Crude petroleum contains all of them in greater or less degree.

In the following chart we have indicated some of them:⁴

⁴ The chart has been re-formatted to fit the software used in preparing this order.

Crude Petroleum		Methane	Essentially natural gas at normal temperatures and pressures
		Ethane	
		Propane	
	Constituents of straight-run gasoline	Butanes	Constituents of natural gasoline
		Pentanes	
		Hexanes	
		Heptanes	
		Octanes	
		Nonanes	
		Decanes, etc.	

40 F. Supp. at 987. The court rejected the argument that crude petroleum was synonymous with oil stating, "there would be no term applicable to petroleum in its natural state with all its original ingredients." Id.

20. In General Petroleum Corp. of Cal. v. United States, the court reached a similar result. 24 F. Supp. 285, 289 (S.D. Cal. 1938). The court wrote, "In view of the state of the law at the time of the enactment and its avowed purpose, I am of opinion that the Congress intended to designate by the words 'crude petroleum' all the hydrocarbon substances - whether in liquid, solid or gaseous form coming out of an oil well" Id.

21. A comparable result was reached in Standard Oil of Cal. v. United States, 39 F. Supp. 180 (N.D. Cal. 1941). The court opined, " . . . natural gasoline, which is derived from wet natural gas, is a product of petroleum" 39 F. Supp. at 182.

22. For purposes of Chapter 13 of Title 69, MCA, crude petroleum includes natural gas. Natural gas is a part of, not a product of, crude petroleum. A natural gas pipeline is declared to be a common carrier by § 69-13-101, MCA.

Declaratory Ruling

On the petition of Westech Energy Corporation for a declaratory ruling, the Commission rules that Westech's proposed natural gas pipeline, if built, would be a common carrier pipeline as defined by § 69-13-101, MCA, and that Westech Energy Corporation would be subject to the jurisdiction of the Commission.

Done and dated this 23rd day of August, 2005 by a vote of 3 to 2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

/s/ Greg Jergeson
GREG JERGESON, Chairman

/s/ Brad Molnar
BRAD MOLNAR, Vice Chairman (dissenting)

/s/ Doug Mood
DOUG MOOD, Commissioner

/s/ Robert H. Raney
ROBERT H. RANEY, Commissioner (dissenting)

/s/ Thomas J. Schneider
THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)